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PP

v.

DATO' SERI ANWAR IBRAHIM

B

FEDERAL COURT, PUTRAJAYA

SURIYADI HALIM OMAR FCJ

AHMAD MAAROP FCJ

HASAN LAH FCJ

ABU SAMAH NORDIN FCJ

C

RAMLY ALI FCJ

[CRIMINAL APPEAL NO: 05-21-02-2014]

31 MARCH 2014

D

CRIMINAL PROCEDURE: *Appeal - Interlocutory appeal - Interlocutory appeal against ruling of Court of Appeal - Whether ruling did not dispose of rights of parties - Whether not a "decision" in law - Whether non-appealable - Whether criminal matter appealed against amenable to be heard by Federal Court - Courts of Judicature Act 1964 ss. 3, 61, 87*

E

CRIMINAL PROCEDURE: *Jurisdiction of court - Federal Court - Interlocutory appeal to - Appeal emanating from decision of Court of Appeal and originating from High Court - Whether appeal within threshold of s. 87 Courts of Judicature Act 1964 - Whether criminal matter appealed against amenable to be heard by Federal Court - Courts of Judicature Act 1964 ss. 3, 61, 87*

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EVIDENCE: *Fresh or further evidence - Calling of - Prerequisites and principles - Whether new evidence already available at trial - Whether relevant to issues at hand - R v. Parks - Applicability - Courts of Judicature Act 1964 ss. 3, 61, 87*

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I

This was an application by the Public Prosecutor to strike out the respondent's interlocutory appeal against the ruling of the Court of Appeal dismissing the respondent's motion to recall a witness, on the ground that the Court of Appeal's decision, for not disposing of the rights of the respondent, was not a 'decision' within the meaning of s. 3 of the Courts of Judicature Act 1964 ('CJA') and therefore not appealable in law. The respondent had been acquitted and discharged by the High Court of an offence under s. 377B of the Penal Code, whereupon the Public

Prosecutor appealed. The appeal was eventually allowed but, pending that decision, the respondent invoked s. 61 CJA and applied to the Court of Appeal, by way of encl. 62(a), for leave to recall PW25, the Investigating Officer in the trial, purportedly to elicit evidence on the rejection of PW25's petition for admission to the Bar of the High Court, Kuala Lumpur, the rejection which was based on the finding of a certain inquiry held by the Human Rights Commission or SUHAKAM ('Suhakam report'). Enclosure 62(a) was however dismissed, essentially on the ground that the respondent had failed to satisfy two of the requirements as laid down in *R v. Parks*, namely that the evidence sought to be called was not available at the trial and that the evidence was relevant to the issues at hand. Dissatisfied, the respondent appealed ('interlocutory appeal'). However, before the interlocutory appeal could be heard by the apex court, the Public Prosecutor applied *vide* encl. 3(a) herein to strike out the same averring that the Court of Appeal's decision in encl. 62(a) was non-appealable. The respondent retorted that the relevant provision for the apex court's consideration was s. 87 of the CJA, in particular the phrase "in respect of any criminal matter decided by the High Court in its original jurisdiction" therein. It was argued that encl. 62(a) was decided for the first time in the Court of Appeal, and not in the High Court, and hence the argument that the ruling was non-appealable could not stand and was devoid of merit. The argument, in short, was that encl. 3(a) did not fall within the threshold of s. 87 CJA and ought on that score be dismissed.

Held (allowing encl. 3(a); striking out *in limine* interlocutory appeal)

Per Suriyadi Halim Omar FCJ delivering the judgment of the court:

- (1) As the respondent had taken the do or die route when relying totally on the incapability of s. 87 of the CJA argument, and deliberately ignoring the cumulative prerequisites of *R v. Parks* and the requirements of s. 61 of the CJA, the respondent must surrender itself to the applicant's legal argument in the event that solitary argument were to fail. The court was not unaware that the collective requirements of *R v. Parks* had been adopted in Malaysia *inter alia* in *Che Din Ahmad v. PP* and *Murugayah v. PP*. (para 12)

- A (2) It was incontrovertible that the Suhakam report was readily available by 23 April 2010 whilst the trial of the respondent at the High Court was after that date. In a word, the additional evidence to be admitted was available during the trial. With some diligence and leg work, PW25 could have been recalled to adduce additional evidence in the High Court. (para 13)
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- C (3) The matter before this court fell squarely under s. 87 of the CJA thereby entitling the court to deliberate on the matter. Section 87 of the CJA was wide enough to include the matter before the court, *ie*, the prayers in encl. 3(a). The matter appealed against was criminal in nature, the decision to be dealt with by us emanated from the Court of Appeal in its appellate jurisdiction, and the matter (not decision) was decided earlier by the High Court in its original jurisdiction. (para 17)
- D
- E (4) The respondent's preference to place the emphasis on the words "in respect of any criminal matter decided by the High Court in its original jurisdiction" rather than reading s. 87 as a whole, was inappropriate. This section speaks of matter, rather than decision, a word thus wide enough to include a striking out application. (para 17)
- F (5) With s. 87 of the CJA being applicable, regardless of the earlier concession made by the respondent, the court agreed with the applicant that the denial by the Court of Appeal to recall PW25 to adduce further evidence was not a final order within the context of s. 3 of the CJA. (para 19)
- G (6) The issue of injustice could not have arisen here as the respondent had been acquitted at the High Court. Whether it was necessary for that additional evidence be allowed by recalling PW25 was a matter of discretion to be exercised by the Court of Appeal. Here it was exercised but to the respondent's dissatisfaction. (para 15)
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Bahasa Malaysia Translation Of Headnotes

- I Ini adalah permohonan Pendakwa Raya untuk membatalkan rayuan interlokutori responden terhadap keputusan Mahkamah Rayuan yang menolak usul responden untuk memanggil semula saksi, atas

alasan bahawa keputusan Mahkamah Rayuan tersebut, disebabkan ianya tidak melupuskan hak-hak responden, bukanlah satu ‘keputusan’ mengikut maksud s. 3 Akta Mahkamah Kehakiman 1964 (‘AMK’) dan kerana itu tidak boleh dirayu. Responden telah dilepaskan dan dibebaskan dari kesalahan di bawah s. 377B Kanun Keseksaan dan berikutnya Pendakwa Raya telah merayu. Rayuan pada akhirnya dibenarkan, namun, sebelum keputusan tersebut dibuat, responden telah menggunakan s. 61 AMK dan sekaligus memohon kepada Mahkamah Rayuan melalui lampiran 62(a) kebenaran untuk memanggil semula SP25, pegawai penyiasat dalam kes perbicaraan beliau, kelihatannya bagi mendapatkan keterangan mengenai penolakan petisyen SP25 untuk dipanggil ke Bar Mahkamah Tinggi, Kuala Lumpur, penolakan mana, adalah dibuat berdasarkan satu inkuiri yang dijalankan oleh Suruhanjaya Hak Asasi Manusia atau SUHAKAM (‘laporan Suhakam’). Lampiran 62(a) bagaimanapun telah ditolak secara intinya atas alasan bahawa responden telah gagal memenuhi dua daripada syarat-syarat seperti yang disebut di dalam *R v. Parks*, iaitu bahawa keterangan yang hendak dikemukakan tidak dapat diperolehi semasa perbicaraan dan bahawa keterangan adalah relevan kepada isu-isu yang berbangkit. Tidak berpuashati, responden merayu (‘rayuan interlokutori’). Walau bagaimanapun, sebelum rayuan interlokutori dapat didengar oleh mahkamah tertinggi, Pendakwa Raya memohon melalui lampiran 3(a) di sini untuk membatalkan rayuan tersebut atas dakwaan bahawa keputusan Mahkamah Rayuan di lampiran 62(a) adalah tidak boleh dirayui. Responden membalas bahawa peruntukan relevan yang perlu ditangani oleh mahkamah tertinggi adalah s. 87 AMK, terutamanya ungkapan “berkaitan apa-apa perkara jenayah yang diputuskan oleh Mahkamah Tinggi dalam bidangkuasa asalnya” di situ. Ianya dihujahkan bahawa lampiran 62(a) diputuskan buat pertama kalinya di Mahkamah Rayuan, dan bukannya di Mahkamah Tinggi, berakibat hujahan bahawa keputusan tidak boleh dirayui adalah tidak beralasan dan tidak bermerit. Dengan kata lain, hujahannya adalah bahawa lampiran 3(a) tidak terangkum ke dalam ruang litup s. 87 AMK dan haruslah dengan itu ditolak.

Diputuskan (membenarkan lampiran 3(a); membatalkan *in limine* rayuan interlokutori)

Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:

- (1) Oleh kerana responden telah mengambil jalan hidup atau mati apabila bergantung sepenuhnya atas ketakupayaan hujahan s. 87 AMK, dan secara sengaja tidak mengendahkan syarat-

- A syarat kumulatif *R v. Parks* serta kehendak-kehendak s. 61
AMK, maka responden perlulah tunduk kepada hujahan
undang-undang pemohon sekiranya hujahan tunggal mereka
ternyata gagal. Mahkamah bukannya tidak menyedari bahawa
kehendak-kehendak kolektif *R v. Parks* telah digunapakai di
B Malaysia antaranya oleh *Che Din Ahmad v. PP and Murugayah
v. PP*.
- (2) Adalah tidak boleh dinafikan bahawa laporan Suhakam jelas
telah diperolehi pada 23 April 2010 sedangkan perbicaraan
responden di Mahkamah Tinggi adalah selepas tarikh tersebut.
C Dengan kata lain, keterangan yang hendak dipanggil sudah
pun wujud semasa perbicaraan. Dengan sedikit kerja dan
usaha, SP25 boleh dipanggil semula di Mahkamah Tinggi
untuk mengemukakan keterangan tambahan.
- D (3) Hal perkara di hadapan mahkamah terangkum sepenuhnya di
bawah s. 87 AMK sekaligus membolehkan mahkamah
menangani hal perkara tersebut. Seksyen 87 AMK adalah
cukup luas untuk merangkumi halperkara di hadapan
mahkamah, iaitu permohonan-permohonan di lampiran 3(a).
E Hal perkara yang dirayui adalah bersifat jenayah, keputusan
yang hendak mahkamah tangani datangnya dari Mahkamah
Rayuan dalam bidangkuasa rayuannya, dan hal perkara (bukan
keputusan) telah diputuskan sebelumnya oleh Mahkamah
F Tinggi dalam bidangkuasa asalnya.
- (4) Pilihan responden untuk meletakkan penekanan kepada
perkataan “berkaitan apa-apa perkara jenayah yang diputuskan
oleh Mahkamah Tinggi dalam bidangkuasa asalnya” sebagai
ganti kepada pembacaan s. 87 pada keseluruhannya, adalah
tidak wajar. Seksyen ini bercakap mengenai hal perkara
G bukannya keputusan, perkataan mana adalah cukup luas untuk
meliputi suatu permohonan pembatalan.
- (5) Dengan s. 87 menjadi tidak terpakai, tanpa mengambilkira
H keakuran responden sebelumnya, mahkamah bersetuju dengan
pemohon bahawa keengganan Mahkamah Rayuan untuk
memanggil SP25 untuk mengemukakan keterangan lanjut bukan
merupakan satu perintah muktamad di dalam konteks s. 3
AMK.
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- (6) Isu ketakadilatan tidak boleh berbangkit di sini memandangkan responden telah dilepaskan oleh Mahkamah Tinggi. Sama ada ianya perlu untuk keterangan lanjut dibenarkan dengan memanggil semula SP25 adalah satu halperkara budibicara yang perlu dilaksanakan oleh Mahkamah Rayuan. Di sini, ianya telah dilaksanakan tetapi secara yang tidak memihak responden. A
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Case(s) referred to:

- Che Din Ahmad v. PP* [1975] 1 LNS 7 HC (*refd*)
Khamis v. PP [1971] 1 LNS 48 HC (*refd*)
Murugayah v. PP [2004] 2 CLJ 489 CA (*refd*)
Phung Geok Hoay v. PP [2012] 1 LNS 805 CA (*refd*) C
PP v. Raymond Chia Kim Chwee & Anor And Another Case [1985] 2 CLJ 457; [1985] CLJ (Rep) 260 FC (*refd*)
R v. Parks [1961] 3 All ER 633 (*refd*)

Legislation referred to:

- Courts of Judicature Act 1964, ss. 3, 50, 51, 61, 87 D
 Penal Code, s. 377B

Other source(s) referred to:

- Halsbury's Laws of England*, 4th edn, para 506, p 240
Janab's Key to Criminal Procedure Evidence Advocacy and Professional Ethics, p 46 E
For the respondent - Karpal Singh (Ram Karpal Singh, Sangeet Kaur Deo, Zaleha Al Hayat & Jeremy Vinesh Anthony with him); M/s Karpal Singh & Co
For the prosecution - Muhammad Shafee Muhamad Abdullah (Mohamad Hanafiah Zakaria & Noorin Badaruddin with him); AG's Chambers F
[Appeal from Court of Appeal; Criminal Appeal No: W-05-19-01-2012]
Reported by Wan Sharif Ahmad G

JUDGMENT

Suriyadi Halim Omar FCJ:

- [1] In Criminal Trial No. 45-9-2009 Dato' Seri Anwar bin Ibrahim (the respondent) was charged at the Kuala Lumpur High Court for committing carnal intercourse against the order of nature with one Mohd Saiful Bukhari bin Azlan, an offence punishable under s. 377B of the Penal Code. The respondent was acquitted whereupon the public prosecutor lodged an appeal against that H
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A acquittal (acquittal appeal). The acquittal was later set aside by the Court of Appeal on 7 March 2014 and the respondent was found guilty of the preferred charge; the appeal filed by the respondent is pending before the Federal Court.

B [2] Pending the disposal of the acquittal appeal at the Court of Appeal, and decided eventually on 7 March 2014, the respondent had taken the anticipatory action of filing a motion in the Court of Appeal (encl. 62 (a)) for leave pursuant to s. 61 of the Courts of Judicature Act 1964 (CJA), to recall one Judy Blacious s/o AF
C Pereira (PW25), the investigating officer in the above case of Perbicaraan Jenayah No. 45-9-2009. Section 61 of the CJA reads as follows:

D In dealing with any appeal in a criminal case the Court of Appeal may, if it thinks additional evidence to be necessary, either take such evidence itself or direct it to be taken by the trial court.

E [3] The relevant evidence was in relation to the rejection of PW25's petition of admission to the Bar of the High Court, Kuala Lumpur. The presiding High Court Judge, Zaleha Yusuf J, on 10 January 2014 had rejected the petition on the ground that PW25 was not a fit and proper person to be admitted to the Bar based on the finding of an inquiry held by SUHAKAM (Suhakam report). It was a public inquiry into the arrest and detention of five lawyers of the Kuala Lumpur Legal Aid Centre on 7 May
F 2009.

G [4] Enclosure 62 (a) was dismissed by the Court of Appeal on 12 February 2014 as the respondent had failed to cumulatively satisfy two out of the four requirements laid down in *R v. Parks* [1961] 3 All ER 633 and the prerequisites of s. 61 of the CJA. The four requirements of the latter case are:

- (i) the evidence that it sought to call must be evidence which was not available at the trial;
- H (ii) the evidence must be relevant to the issues;
- (iii) the evidence is credible in the sense that it is well capable of belief; and
- I (iv) that evidence would have created a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

[5] The Court of Appeal held the view that as the respondent had failed to satisfy the first two requirements there was thus no further need to consider the other two requirements out of the four. Aggrieved, the respondent filed an appeal on 13 February 2014 (the interlocutory appeal). Before the interlocutory appeal could be heard the applicant filed encl. 3(a) to strike it out. This application was served on the respondent. At the end of the hearing on 4 March 2014 we allowed encl. 3(a)'s application and accordingly struck out the respondent's interlocutory appeal (see *Halsbury's Laws of England* (4th edn.) para. 506 at 240 as to the explanation of interlocutory; *PP v. Raymond Chia Kim Chwee & Anor And Another Case* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260; [1985] 2 MLJ 436). We now supply our reasons for striking it out.

The Arguments Raised By Both Parties Before Us

[6] The applicant initially raised four grounds in the affidavit-in-support of this striking out application, and they were:

- (i) the decision of the Court of Appeal that led to the filing of the interlocutory appeal was non-appealable;
- (ii) the respondent failed to satisfy the requirements of s. 61 of the CJA;
- (iii) the recall of PW25 was unnecessary; and
- (iv) the substantive appeal was doomed to fail.

[7] Despite the above manifold grounds the applicant merely relied on the ground that the interlocutory appeal must be struck out on the basis that the Court of Appeal's ruling over encl. 62(a) was non-appealable as it did not fall within the meaning of 'decision' pursuant to s. 3 of the CJA. In a nutshell it was an interlocutory decision. That decision had not finally disposed of the rights of the respondent. Learned counsel for the applicant then alluded to the run of the mill cases which dealt with failed appeals and interlocutory appeals dealt with by courts.

[8] There was a slight lapse of memory when learned counsel for the applicant veered onto the merits of the case, ventilating that the respondent was never deprived of any opportunity to question PW25, as he did give evidence and had been confronted

A with the Suhakam Report during the trial proper. With the objection raised by the respondent, as the matter before us should be dealt with only on technicalities, no further facts were adduced by the applicant.

B [9] The respondent took a rather novel route to counter
encl. 3(a) by submitting that the issue in encl. 62(a) originated
from the Court of Appeal, unlike the run of the mill cases where
the subject matter originated from the High Court. In support of
his argument the respondent argued that the relevant provision for
C our consideration was s. 87 of the CJA; a provision that was not
alluded to by the applicant at the outset. The respondent argued
that emphasis should be on the words “in respect of any criminal
matter decided by the High Court in its original jurisdiction” as
provided for under the latter provision. Section 87 of the CJA
D provides as follows:

87. Jurisdiction to hear and determine criminal appeals

(1) The Federal Court shall have jurisdiction to hear and
determine any appeal from any decision of the Court of
E Appeal in its appellate jurisdiction in respect of any criminal
matter decided by the High Court in its original jurisdiction
subject to any rules regulating the proceedings of the Federal
Court in respect of appeals from the Court of Appeal.

(2) ...

F (3) An appeal may lie on a question of fact or a question of law
or on a question of mixed fact and law.

[10] The respondent submitted that s. 87 applies only to
decisions of the Court of Appeal in respect of decisions from the
G High Court in its original jurisdiction ie, of decisions which were
ventilated and decided initially by it and subsequently determined
by the Court of Appeal in its appellate jurisdiction. As encl. 62(a)
was decided for the first time in the Court of Appeal, the
argument of the applicant that the decision here was non-
H appealable therefore could not stand. The respondent on the
other hand graciously conceded that if we were to conclude that
s. 87 was applicable then the applicant's arguments must stand;
this is so as the word ‘decision’ appears also in s. 87. This is
reflected in the respondent's written submission which reads as
I follows:

Only in the event the said provision applies, would the restriction
of what constitutes a ‘decision’ in section 3 of the CJA arise as
the word ‘decision’ appears in the said section 87.

[11] The respondent thereupon submitted that as the applicant's application did not fall within the threshold of s. 87 of the CJA encl. 3(a) therefore ought to be dismissed. A

[12] We held the view that as the respondent had taken the do or die route when relying totally on the inapplicability of s. 87 of the CJA argument, and deliberately ignoring the cumulative prerequisites of *R v. Parks* [1961] 3 All ER 633 and the requirements of s. 61 of the CJA, the respondent must surrender itself to the applicant's legal argument in the event that solitary argument were to fail. We were not unaware that the collective requirements of *R v. Parks* [1961] 3 All ER 633 had been adopted in Malaysia eg, as applied in *Che Din Ahmad v. PP* [1975] 1 LNS 7; [1976] 1 MLJ 289 and *Murugayah v. PP* [2004] 2 CLJ 489; [2004] 2 MLJ 545. B C

[13] It was incontrovertible that the Suhakam report was readily available by 23 April 2010 whilst the trial of the respondent at the High Court was after that date. In a word the additional evidence to be admitted was available during the trial. With some diligence and leg work PW25 could have been recalled to adduce additional evidence at the High Court. D E

[14] Section 61 requires a subjective deliberation of the Court of Appeal's mind, whether the additional evidence would be necessary, and thereafter decide whether such additional evidence would be taken down by itself or by the trial court. Necessary means that unless additional evidence is admitted, a miscarriage of justice would result or its reception is expedient in the interest of justice (*Khamis v. PP* [1971] 1 LNS 48; [1971] 2 MLJ 267; *Phung Geok Hoay v. PP* [2012] 1 LNS 805; [2013] 3 MLJ 728). F G

[15] The issue of injustice could not have arisen here as the respondent had been acquitted at the High Court. Whether it was necessary or not that additional evidence be allowed by recalling PW25 was a matter of discretion to be exercised by the Court of Appeal. Here it was exercised but to the respondent's dissatisfaction. H

The Basis Of Our Decision

[16] In summary, and a form of reiteration, the respondent had canvassed the argument that there could not be any other interpretation except that under s. 87 of the CJA encl. 62(a) must I

- A first have been decided by the High Court in its original jurisdiction, which meant that the High Court would have considered the matter in the first instance as opposed to its appellate jurisdiction over a matter heard in the first instance by a court below (*Janab's Key to Criminal Procedure Evidence Advocacy and Professional Ethics* p. 46). Once that was undertaken then only could the Federal Court come into the picture, and that too after the Court of Appeal in its appellate jurisdiction, had dealt with that High Court's decision.
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- C [17] Having alluded to the canon of construction we held the view that the matter before us did fall squarely under s. 87 of the CJA hence entitling us to deliberate on the matter. We were satisfied that s. 87 of the CJA was wide enough to include the matter before us ie, the prayers in encl. 3. The matter appealed against was criminal in nature, the decision to be dealt by us emanated from the Court of Appeal in its appellate jurisdiction, and the matter (not decision) was decided earlier by the High Court in its original jurisdiction. The respondent's preference to place emphasis on the words "in respect of any criminal matter decided by the High Court in its original jurisdiction" rather than reading s. 87 as a whole, was inappropriate. This section speaks of matter, rather than decision, a word thus wide enough to include a striking out application.
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- F [18] The other relevant provisions that must be considered by us are ss. 3, 50 and 51 of the CJA, with s. 50 being the enabling provision empowering the Court of Appeal to hear and determine criminal appeals from the High Court and subordinate courts. Section 51 lays down the mode of appeal, the time factor to file the appeal, the substance of the appeal and the like. But both the provisions of ss. 50 and 51 of the CJA speak of the word 'decision' and this is where s. 3 of the CJA becomes relevant. Under s. 3 is legislated the definition of 'decision', and it reads:
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- H "decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not fully dispose of the rights of parties.
- I [19] With s. 87 of the CJA being applicable, regardless of the earlier concession made by the respondent, we agree with the applicant that the denial by the Court of Appeal to recall PW25 to adduce further evidence was not a final order within the context of s. 3 of the CJA.

Conclusion

[20] For reasons stated above, we decided that the appeal filed against the ruling of the Court of Appeal disallowing the prayers of encl. 62(a) incompetent, and thus non-appealable. Enclosure 3(a) was thus allowed followed by the consequential order that the interlocutory appeal of the respondent be struck out *in limine*.

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